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87-758

Case No. _____



IN THE
**SUPREME COURT OF THE UNITED STATES**
October Term, 1987

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ROGER D. HOVATER, *Petitioner,*

*v.*

EQUIFAX SERVICES, INC., *Respondent.*

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## PETITION OF PETITIONER

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether an insurance claims report issued by a credit reporting agency to an insurer, which is used by insurer to deny insurance benefits to its insured, is a "consumer report" under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §1681 et seq.

2. Whether 15 U.S.C. §1681g disclosure requirements apply to reports which are not "consumer reports".

3. Whether the application of a statute of limitation to bar a claimant's cause of action, where claimant could not by exercise of reasonable diligence have discovered the existence of his claim within the limitation period, violates the claimant's right to Due Process of law.

4. Whether the court below misapplied Alabama law which allows tolling of a statute of limitation where a

third party has concealed the existence of facts giving rise to the claim.

5. Whether this Court's interpretation of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §1961 et seq., was disregarded by the court below.

PARTIES TO THE PROCEEDING BELOW

Petitioner Roger D. Hovater, Appellee/Cross-Appellant below, was the plaintiff in the district court. Respondents Equifax, Inc., and Equifax Services, Inc., were the Appellants/ Cross-Appellees below and the defendants in district court.

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## REFERENCE TO THE OPINION BELOW

The opinion below is reported as Hovater v. Equifax, Inc., 823 F.2d 413 (11th Cir. 1987). A copy of the opinion appears in the appendix.

## STATEMENT OF JURISDICTION

The decision below was entered on July 30, 1987. Jurisdiction is granted to this Court by 28 U.S.C. §1254(1) to review that decision by Writ of Certiorari.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, §1 reads as follows:

> Citizens of the United States
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

15 U.S.C. §1681 et seq. is known as The Fair Credit Reporting Act. (FCRA). 15 U.S.C. §1681 reads as follows:

§1681. Congressional findings and statement of purpose

(a) The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting

agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) It is the purpose of this title [15 U.S.C. §§1681 et seq.] to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title [15 U.S.C. §§1681 et seq.].

15 U.S.C. § 1681a(d) reads as follows:

(d) The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family or

household purposes, or (2) employment purposes, or (3) other purposes authorized under section 604 [15 U.S.C. §1681b]. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card of similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under section 615 [16 U.S.C. §1681m].

15 U.S.C. §1681b reads as follows:

§1681b. Permissible purposes of consumer reports

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe-

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider in applicant's financial responsibility or status; or

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

15 U.S.C. § 1681g reads as follows:

§1681g. Disclosures to consumers

(a) Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

(1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

(2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: Provided, that in the event an action is brought under this title [15 U.S.C. §§ 1681 et seq.], such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3) The recipients of any consumer report on the consumer which it has furnished-

(A) for employment purposes within the two-year period preceding the request, and

(B) for any other purpose within the six-month period preceding the request.

(b) The requirements of subsection (a) respecting the disclosure of sources of

information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this title [180 days following Oct. 16, 1970; see effective date note to 15 U.S.C. § 1681] except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

18 U.S.C. §1961 et seq is known as the Racketeer Influenced and Corrupt Organizations Act. (RICO). 18 U.S.C. §1961 reads in pertinent part as follows:

§1961. Definitions

As used in this chapter [18 U.S.C. §§1961 et seq.]

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than on year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to

counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), section 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 [29 U.S.C. §186] (dealing with restrictions on payments and loans to labor organizations) or

section 501(c) [29 U.S.C. §501(c)] (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States:

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;
(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * *

18 U.S.C. §1962 reads as follows:

§1962. Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18 United States Code [18 U.S.C. §2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of any unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or

in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. §1964 reads in part as follows:

§1964. Civil remedies

* * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 U.S.C. §1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Ala. Code §6-2-3 (1975) reads as follows:

§6-2-3. Accrual of claim - Fraud.

In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have one year within which to prosecute his action.

Ala. Code §6-5-102 reads as follows:

§6-5-102. Suppression of material facts.

Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.

## STATEMENT OF THE CASE

Petitioner Roger Hovater was the owner of a house in the Colbert Heights Community of Colbert County, Alabama [R4-177]. The house was insured against fire loss by Pennsylvania National Mutual Casualty Company (hereinafter "Penn National") [Plaintiff's Exhibits 4 and 5; R4-184 to 185]. In the early morning hours of September 1, 1982, the house and its contents were totally destroyed by fire. [R4-196].

On November 15, 1982, through its attorney Braxton Ashe, Penn National hired Respondent Equifax Services, Inc., (hereinafter "Respondent" or "Equifax") to conduct an investigation of Petitioner. The case was assigned to Equifax investigator Greg Rowe who undertook the investigation on November 15 and 16, 1982. [R7-69 to 70]. During the course of his work Mr. Rowe orally briefed Lt. Ronnie

May of the Colbert County Sheriff's Department and Attorney Ashe as to all the significant information in the subject report. [Plaintiff's Exhibit 1, p. 9]. On November 18, 1982, copies of the subject written report were sent to James Goad of Penn National, Attorney Ashe, and to the Colbert County Sheriff's Department. [R7-71].

The Equifax report of November 18, 1982 accused Petitioner of the arson of the insured property, tax evasion, fraudulent conveyances, heavy illegal gambling debts, implication in other arson investigations, mental illness, consorting with known criminals, and being capable of retaliation against any informant or witness. [Plaintiff's Exhibit 1]. Although a defense of truth to Petitioner's libel and slander claims was originally asserted, that defense was withdrawn at trial [R10-130]. Respondent

admitted that many portions of the report were libelous and slanderous. [Plaintiff's Exhibit 25; R6-19 to 45].

A copy of the Equifax report was mailed to Atlanta, Georgia where on November 23, 1982, it was reviewed by Richard Romard, special fire investigation supervisor. Mr. Romard recognized that the report was defamatory and determined that the copies which had been published should be destroyed. [R5-157, 171 to 172]. On November 24, 1982, Romard contacted Jerry Bredeson of the Huntsville, Alabama Equifax office and instructed him to retrieve the disseminated reports, delete the defamatory portions, and prepare a new report. [R6-87]. No instructions were given to inform the recipients that the original report was erroneous. [R6-91 to 93]. No new investigation was undertaken to either verify the old information or to produce new data. On November 30, 1982,

R. F. Whiting, an Atlanta supervisor, agreed that the Romard plan was "very necessary" and noted that Equifax would be very fortunate if it could "escape significant litigation" as a result of the Hovater investigation. (emphasis in original) [Plaintiff's Exhibit 25].

Bredeson requested that the recipients of the original report return their copies to Equifax, but did not inform them that it was erroneous. [R7-74, 76 to 81]. Penn National and Attorney Ashe retained copies of the original report. [R8-26, R10-37]. The entire Hovater file from Huntsville was mailed to Romard in Atlanta.

The original reports were destroyed by Romard. [R6-11]. Those employees of Equifax who reviewed the report considered it to be defamatory. [Plaintiff's Exhibit 25]. The document was characterized by R. F. Whiting (division manager of claims

in Atlanta), by Romard, and by Eugene Merrigan (the President of Equifax) as the worst report they had ever seen. [Plaintiff's Exhibit 25; R6-67; R9-139].

On December 22, 1982, Penn National instituted a Declaratory Judgment action against Hovater, alleging arson and misrepresentation. On August 1, 1983, Petitioner's attorney filed Requests for Production directed to Penn National seeking each and every document in its file including those related to independent investigations. A response to that request was due within 30 days, Fed. R. Civ. P. 34, well within the one year statute of limitations. Upon Penn National's failure to comply, Hovater filed a Motion to Compel on November 25, 1983, and the court entered an order on December 8, 1983, compelling production. A limited production was made by Penn National and a further Request for

Production was filed by Hovater on April 14, 1984, seeking the entire investigative file. The court made an in camera inspection of the materials sought, and on July 3, 1984, ordered Penn National to produce them. On June 27, 1984, Penn National sent Hovater only the file material of independent insurance adjuster R. C. Oldham. On December 17, 1984, a pretrial conference was held at which time Penn National was again ordered to produce the requested file material.

On January 18, 1985, almost one and a half years after Hovater's original Request for Production, the Equifax report of November 18, 1982, was finally produced. Prior to January 18, 1985 Hovater had no knowledge of the existence of the report or that he had even been investigated by Equifax. [R4-216].

On February 19, 1985, Hovater personally delivered a written request for

disclosure to the Equifax office in Florence, Alabama. [Plaintiff's Exhibit 18; R5-4]. Hovater was instructed at that time to telephone the Equifax office in Birmingham, Alabama for disclosure. [R5-55]. Upon telephoning Birmingham, Hovater was told that the file was lost and that they therefore could not disclose it to him. [R5-56]. Hovater's attorney wrote a letter to the Birmingham office confirming Hovater's efforts to obtain disclosure, forwarded a copy of the written disclosure request and again stated Hovater's desire for full disclosure. [Plaintiff's Exhibit 20; R5-62]. That afternoon, Hovater received a telephone call at his home from an unidentified Equifax employee, inquiring as to whether he was the person who had requested disclosure. When he asked the caller's name, the caller hung up. [R5-63]. Hovater's attorney received a

letter from Equifax dated February 20, 1985, acknowledging receipt of the disclosure request. [Plaintiff's Exhibit 21].

No FCRA disclosure was ever made by Equifax to Hovater. The present suit was instituted on March 1, 1985 alleging libel and slander, violations of Fair Credit Reporting Act, 15 U.S.C. §1681 et seq. (FCRA), violations of Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961-1968, and several other causes of action. All of these claims revolved around the false Equifax report of November 18, 1982 and the subsequent attempts to cover it up. Jurisdiction was rested upon 28 U.S.C. §1332, and also upon 15 U.S.C. §1681p in regard to the FCRA claim.

After suit was filed a Request for Production was directed to Equifax. Copies of the subject report and of a

subsequent, unrelated report were produced from the Equifax files. No background source information was ever provided as required by §1681g(a)(2).

The statute of limitation in Alabama for libel and slander was one year from the date of publication. The trial court held that the statute was tolled pursuant to Alabama's fraudulent tolling statute, Ala. Code §6-2-3 (1975). The FCRA statute of limitations was held to have been tolled pursuant to 15 U.S.C. §1681p. Summary judgment was granted to Equifax on Petitioner's RICO claims. The jury returned verdicts of $50,000.00 for violation of the FCRA and $450,000.00 on the libel and slander claims.

The Eleventh Circuit Court of Appeals held that the statute of limitations for libel and slander was not tolled, that the FCRA did not apply to the subject report, and that the trial court properly granted

summary judgment on the RICO counts. Hovater v. Equifax, Inc., 823 F.2d 413 (11th Cir. 1987). The case was remanded with instructions to enter judgment for Respondent Equifax.

## ARGUMENT FOR ISSUING THE WRIT

### I. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH A DECISION FROM THE COURT OF APPEALS FOR THE NINTH CIRCUIT AND DIRECTLY CONFLICTS WITH A DISTRICT COURT CASE FROM ANOTHER CIRCUIT

The Fair Credit Reporting Act, 15 U.S.C. §1681 et seq., was enacted, in part, to govern credit reporting agencies in regard to their preparation and dissemination of "consumer reports." A conflict has developed between the circuits as to the proper definition of "consumer reports" and the role of §1681b(3)(E) in that definition. The issue for this Court to determine would be whether this section is to be read literally thus making the FCRA applicable to all reports prepared for "legitimate business need[s] ... in connection with a business transaction concerning the consumer," §1681b(3)(E), or whether only those reports which meet the specific

definitions in §1681a(d) and §1681b are covered by the Act.

The Petitioner was the subject of a "claims report" rendered by Equifax to aid his insurance company in deciding whether to pay or to deny his claim for insurance benefits. The court below held that an insurance claims report is not a "consumer report" under the FCRA, thus aligning the Eleventh Circuit with the Third Circuit's decision in Houghton v. New Jersey Manuf. Ins. Co., 795 F.2d 1144 (3rd Cir. 1986). In reaching that result those two circuits held that the general provision in §1681b(3)(E) ("legitimate business need for the information") applied only to reports which met one of the specifically enumerated definitions of §1681a(d) and §1681b(3)(A-D). Each court thereby rendered §1681b(3)(E) meaningless and effectively excised it from the Act.

Those holdings directly conflict with the Statement of Purpose set out at §1681(b) which states that "[i]t is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information ..." The "other information" referred to in this section finds its operative provision in §1681b(3)(E) which extends the mandate of the FCRA to all reports involving a "legitimate business need for the information." Therefore, based upon both the stated purpose of the Act and its operative provisions, it is clear that the courts below improperly limited the FCRA in holding that the protective provisions did not extend to an insurance claims report.

Apparently there are no federal appellate cases which directly conflict

with those decisions (i.e. none hold that insurance claims reports per se are "consumer reports"). However, the interpretation given by the Eleventh and Third Circuits to the sections of the FCRA at issue, §1681a(d) and §1681b(3)(E), conflict with the interpretation rendered in Greenway v. Information Dynamics Ltd., 524 F.2d 1145 (9th Cir.),cert. dismissed 424 U.S. 936 (1976). The Greenway decision leaves no doubt but that in the Ninth Circuit insurance claims reports would be covered by the FCRA.

In Greenway defendant provided reports to its subscribers which contained information concerning persons who had had checks returned by their banks. The issue was whether such reports were "consumer reports" subject to the FCRA. Just as in the present case, those reports were not

included in the express definition of "consumer reports." Nevertheless the court determined that they were included in the general provision found at §1681b(3)(E), and thus did meet the definitional criteria.

The Greenway court affirmed and fully adopted the "careful reasoning" of the district court. 524 F.2d at 1146. The district courts' decision, Greenway v. Information Dynamics, Ltd., 399 F.Supp. 1092 (D.Ariz. 1974), interpreted the plain and unambiguous language of §1681b(3)(E) exactly as Petitioner urged the court below in the present case. The Greenway court gave literal meaning to the words of §1681b(3)(E), read those words back into §1681a(d) as mandated by that section, and construed the meaning as follows:

> When these two sections of the Act, §1681a(d) and §1681b(3)(E), are read together, as the Act indicates they must be, the result is clear: when an agency

> disseminates information bearing on any of the seven characteristics of a consumer listed in §1681a(d) to a third party, and the agency knows or expects that it will be used "in connection with a business transaction involving the consumer," then that information is a "consumer report" and its originator is a "consumer reporting agency."

399 F.Supp. at 1095.

If the Ninth Circuit's interpretation was applied to the present case, it is obvious that the Eleventh Circuit would have found that insurance claims reports were covered by the FCRA. The subject report related to the seven characteristics listed in §1681a(d), and it was used in the determination of whether to pay insurance benefits to an insured, obviously a "business transaction involving the consumer." In fact, the Greenway court found accord and full support for its reasoning in Beresh v. Retail Credit Co., Inc., 358 F.Supp. 260

(C.D. Cal. 1973), a case which did specifically hold that insurance claims reports are "consumer reports" under the FCRA.

The difference in the way the courts have interpreted the definition of "consumer reports" apparently lies in different approaches taken to statutory construction generally. The Eleventh Circuit chose to ignore the plain and unambiguous language of the FCRA in order to limit its reach. It relied upon obscure canons of statutory construction which should not have come into play in light of the clear statutory language employed by Congress. It further looked to "legislative history" when there was no ambiguity in the Act itself which needed to be resolved.

The Ninth Circuit, on the other hand, determined that literal meaning should be

given to the words which Congress chose, and that the broad remedial purpose behind the FCRA prevented the courts from taking it upon themselves to limit its reach. More is said on this point in the next section of this Petition, but it should be evident from the present discussion that more than the precise issue of defining "consumer reports" is at stake here. The circuits are divided as to their overall approach to statutory construction.

The Eleventh and Third Circuits seem less willing to read Congressional enactments literally, and are apparently concerned more with limiting federal remedies than with providing the broad consumer protection envisioned by Congress. The Ninth Circuit has just the opposite approach, and such differences could lead to other federal statutes being given conflicting interpretations by the various

circuits. This gives more urgency to the present Petition, and indicates that certiorari should be granted in order to promote uniformity among the circuits in their basic approaches to statutory construction, as well as in regard to the definition of "consumer reports."

As mentioned above, Beresh v. Retail Credit Co., Inc. 358 F.Supp. 260 (C.D. Cal. 1973), explicitly held that insurance claims reports are FCRA "consumer reports." The Beresh court held "that the broad language of §1681b(3)(E) embraces the insurance claims investigative reports in question." 358 F.Supp. at 262. Speaking to the fact that the report was used to determine whether an insurance claim should be paid on a policy already in effect, the court said that there was "no doubt that Retail Credit and Information Research were procured by Sovereign Life

to prepare these reports 'in connection with a business transaction' involving the insurance company and its insured Beresh, a consumer." Id.

The FCRA was enacted to assure that reasonable and fair procedures are utilized by agencies which investigate consumers for consumer credit, personnel, insurance, and other legitimate purposes. 15 U.S.C. §1681. As federal legislation, its effect is obviously intended to be nationwide. The issue urged upon the Court is not a minor or esoteric point within the FCRA, but rather is a threshold matter as to what type reports will be governed by the Act. In light of the broad language of §1681b(3)(E) this is an issue likely to arise repeatedly in the future, and one which will have a profound impact on the extent to which consumers are protected. Unless this Court settles

the basic issue of the meaning and reach of §1681b(3)(E), there cannot be national uniformity in the application of the FCRA.

The Court is urged to settle the law now, because if the decision below is allowed to stand, countless reports on consumers will be performed without FCRA compliance. If the decision below is incorrect on the merits, then those reports will have been made in contravention of Congressional mandate, with disastrous impact on the lives of many consumers such as Petitioner.

## II. THE COURT BELOW VIOLATED RULES OF STATUTORY CONSTRUCTION ENUNCIATED BY THIS COURT, AND THEREBY GAVE THE FCRA A MEANING WHICH CONTRAVENES THE PLAIN LANGUAGE OF THE STATUTE AND FRUSTRATES CONGRESSIONAL INTENT.

By holding that the subject report was not a "consumer report" under the FCRA, the court below misapplied canons of statutory construction laid down by this Court in a manner which completely frustrates the broad Congressional purpose behind the Act. See §1681. In so doing, the Court of Appeals ignored the plain language of §1681b(3)(E) and rendered it totally meaningless.

The court first correctly determined that insurance claims reports were not expressly included in the definition of "consumer reports." Next, §1681b(3)(E) was considered, and it was in the construction of this catch-all provision that the court erred. The court stated that §1681a is the preeminent definitional

section, and that §1681b must therefore be conformed to its bounds. 823 F.2d at 419. This construction ignores the fact that §1681a expressly incorporates §1681b into the definition. This does not mean that §1681b would be limited by §1681a, but rather means that the breadth and scope of §1681a is extended to include the purposes enumerated in §1681b.

The three purposes listed in §1681a(d) (eligibility for (1) credit or personal insurance, or (2) employment purposes, or (3) other purposes under §1681b) are all separated by the word "or." As this Court has stated, terms connected by a disjunctive should ordinarily be given separate meanings. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). This canon of construction is violated by limiting the third purpose in §1681a(d) to the parameters expressed in the first two.

The court alternatively applied the rule of ejusdem generis, and thereby violated this Court's enunciation that ejusdem generis is merely an aid to construction which comes into play if, and only if, the language of the statute is ambiguous or its meaning uncertain. United States v. Turkette, 452 U.S. 576 (1981). The court should have instead followed the primary rule of construction that where the words of the statute are unambiguous, as they certainly are here, judicial inquiry is complete. Rubin v. United States, 449 U.S. 424, 430 (1981). For a "plain meaning" interpretation of §1681b(3)(E), see Greenway v. Information Dynamics, Ltd, 399 F. Supp. 1092 (D. Ariz. 1974) aff'd per curiam 524 F.2d 1145 (9th Cir.), cert. dismissed 424 U.S. 936 (1976), and Beresh v. Retail Credit Co., Inc., 358 F.Supp 260 (C.D. Cal. 1973),

which are discussed in the previous section of this Petition.

In further support of its conclusion, the Court of Appeals relied upon the legislative history of the FCRA. 823 F.2d at 419-20. This was an improper step in the construction process, for it is inappropriate to look at legislative history where the language in the statute is unambiguous. Blum v. Stenson, 465 U.S. 886, 896 (1984). It is the actual words used in the statute itself, rather than pronouncements by committees and legislators, which are to be taken as the final expression of Congressional intent. American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982).

Nevertheless, even if it is assumed arguendo that it was proper to look at the legislative history, the conclusions reached by the court cannot be reconciled

with the purpose of the FCRA expressed in §1681. This expression of purpose leaves little doubt that Congress wanted broad protection for consumers who were being harmed by shoddy reports and reporting procedures. A consumer whose insurance application is accepted, who pays a premium, and is later denied benefits due to a false report is certainly harmed more than one who is simply denied insurance in the first place and thus pays no premium.

The court read too much into the absence of insurance claims reports being expressly mentioned and ignored the broad and explicit language of §1681b(3)(E), which undoubtedly would include insurance claims reports. This rendered §1681b(3)(E) meaningless because it was left with no field of operation beyond that expressed in the previous sections. This violated the canon of construction

that a statute is not to be interpreted so as to render one part inoperative. Colautti v. Franklin, 439 U.S. 379, 392 (1979).

The court also read too much meaning into the fact that a later Congress refused to amend the FCRA to expressly include insurance claims reports. As this Court has said, it is dubious to take Congressional inaction as a basis for construction. United States v. Price, 361 U.S. 276 (1960). It is equally as likely that Congress considered insurance claims reports as being already covered by the FCRA and that amendment was therefore unnecessary, or that Congress desired the courts to flesh out §1681b(3)(E) in light of actual cases.

Further, in that portion of the court's opinion where deference was given to the FTC's interpretation of "consumer

reports", the court cited the FTC opinion that says insurance claims reports are not included in the definition at the time they are obtained. The court failed to cite the next paragraph which states that if such reports are later used to deny a claim, as in the present case, then they become "consumer reports" subject to the FCRA. 5 CONSUMER CRED. GUIDE (CCH). ¶11,307 at 59,829 (1977)

The law is clear that the statutory words employed by Congress are generally to be given a literal reading. United States v. Locke, 105 S. Ct. 1785, 1792 (1985), Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985). A literal interpretation of the definition of "consumer report" found in §1681a(d) and §1681b(3)(E) would include the insurance claims report at issue. It certainly bore

on the seven characteristics in §1681a(d), and was used to deny insurance benefits to an insured, obviously "a business transaction involving the consumer." §1681b(3)(E).

It is apparent that the Eleventh Circuit was reluctant to extend a broad interpretation to §1681b(3)(E), as it was thought that this would diminish the raison d'etre of the specific definitions. Yet, there would be nothing incongruous with Congress specifically enumerating as "consumer reports" particular types of reports which it did not want left to judicial decision, §1681a(d) and §1681b(3)(A-D), and thereafter to include in the definition a catch-all provision, §1681b(3)(E), to assure that all other reports involving a legitimate business need in a transaction with the consumer would be included. See, for example,

§1681c(a)(6), another catch-all provision which could not possibly be construed to limit its application to the specific instances there enumerated.

The only conclusion that can be drawn is that those types of reports which are specifically enumerated are "consumer reports," and that all other reports, such as the one in this case, which meet the literal definition of §1681b(3)(E) are also "consumer reports." Because of the importance of settling the construction to be given §1681b(3)(E) and the importance of supervising lower courts which have flagrantly disregarded this Court's rules of construction, certiorari should be granted.

## III. THE DISCLOSURE REQUIREMENTS MANDATED BY §1681g ARE NOT RESTRICTED TO CONSUMER REPORTS

The Eleventh Circuit also erred in reversing Petitioner's FCRA claim in regard to Equifax's failure to comply with his disclosure request made pursuant to §1681g on February 19, 1985. Equifax first told Hovater that it could not comply because his file had been lost although in fact it had been destroyed. [R5-56, R6-11]. §1681g requires that reporting agencies disclose all information in their "files" (defined in §1681a(g) as all information on the consumer, regardless of how stored) upon request of the consumer. Since the disclosure of all information is mandated this would apply whether or not a "consumer report" had been issued by the agency. Heath v. Credit Bureau of Sheridan, Inc., 618 F.2d 693 (10th Cir.

1980); Kiblen v. Pickle, 653 P.2d 1338 (Wash. App. 1982).

The evidence is uncontroverted that Equifax did not provide the report in question until mid-April of 1985, pursuant to discovery requests made by Petitioner in the lawsuit filed March 1, 1985. 823 F.2d at 414. Further, the Equifax files contained an unrelated report which was not disclosed. The failure to comply with the disclosure request of February 19, 1985 was a clear violation of §1681g. The Eleventh Circuit apparently did not address this issue because it mistakenly assumed that the FCRA would apply only if the report in question was a "consumer report." If the Eleventh Circuit's holding on the other FCRA violations is upheld, then this Court should direct a new trial to determine solely the issue of Petitioner's claimed violation of §1681g.

## IV. THE APPLICATION OF THE STATUTE OF LIMITATION TO BAR PETITIONER'S CAUSE OF ACTION FOR LIBEL AND SLANDER, WHERE PETITIONER COULD NOT BY EXERCISE OF REASONABLE DILIGENCE HAVE DISCOVERED THE EXISTENCE OF HIS CLAIM UNTIL AFTER THE STATUTE HAD RUN, VIOLATES PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

The report prepared by Equifax contained numerous defamatory assertions about Hovater. He first learned about that report on January 18, 1985, 2 years and 2 months after its publication. The record is absolutely clear that Petitioner could not have discovered the existence of the report any sooner. Suit was filed only 41 days after discovery of the report. The statute of limitation was one year after publication. Ala. Code §6-2-39 (1975).

The Alabama Supreme Court has explicitly rejected a "discovery rule" for determining when the statute of limitation begins to run. Garrett v. Raytheon Co., Inc., 368 So. 2d 516 (Ala. 1979). There

the Alabama court conceded that "Alabama's rejection of the 'Discovery Rule' [may be] contrary to the weight of opinion generally," 368 So. 2d at 521, but nevertheless refused to usurp what it deemed to be the exclusive province of the legislature to establish statutes of limitation. Id. Thus, in Alabama plaintiffs who are unfortunate enough to have been injured in a way where they could not possibly have known of their claim within the limitation period are afforded no remedy under the law. This is also true in all other states which have declined to follow a discovery rule. See generally Annot., 80 A.L.R. 2d 368, §7[b,c] (1961). In Alabama, only a fraudulent concealment of the cause of action serves to toll the statute. Tonsmeire v. Tonsmeire, 285 Ala. 454, 233 So. 2d 465 (1970); Holdbrooks v. Central

Bank of Alabama, N.A., 435 So. 2d 1250 (Ala. 1983). Petitioner maintains that this limited rule of discovery is inadequate to meet Due Process requirements.

The Alabama Supreme Court's deference to the state legislature to "abrogate this rule and adopt a more equitable one," 368 So. 2d at 521, perhaps shows a misplaced confidence that the legislature will take such action. The legislature has not done so since Garrett v. Raytheon was decided in 1979. Further, Alabama has recently passed "tort reform" legislation which greatly constricts plaintiffs' rights rather than expanding them. 1987 Ala. Acts 87-164, 87-181 to 189. The Alabama legislature cannot be relied upon to enact a discovery rule which would comply with Due Process. Petitioner maintains that Due Process requires that a discovery rule

be applied to the facts of this and similar cases and this cannot be left to the whim of the state legislature.

Petitioner is fully aware that a decision in his favor on this issue would have far-reaching effects on civil litigation throughout the nation. However, it is asserted that the fundamental unfairness of applying a statute of limitation to bar a claim which a reasonably diligent plaintiff could not have known about in time to institute a civil action violates the Due Process Clause. An issue as important as this certainly should be passed upon by this Court.

There is strong support to be found for Petitioner's position. This Court has already held that a cause of action is a property interest protected by the Due Process Clause. Logan v. Zimmerman Brush

Co., 455 U.S. 422, 428 (1982). In Logan, this Court further noted that "the Fourteenth Amendment's Due Process Clause has been interpreted as preventing States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s]'. Boddie v. Connecticut, 401 U.S. 371, 380, 91 S.Ct. 780, 787, 28 L.Ed. 2d 113 (1971)." 455 U.S. at 429-30 (footnote omitted).

Applying this concept to the present case, it becomes apparent that the barring of Petitioner's claim before he could have discovered its existence is "the equivalent of denying [him] an opportunity to be heard on [his] claimed right." Id. Unless Due Process demands a discovery rule for the time when a cause of action accrues, then numerous litigants will

never have an opportunity for redress of wrongs done to them, regardless of how terrible or severe. A discovery rule applies generally to federal causes of action, Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985), and the same protection should be extended to govern state causes of action.

Further, in decisions regarding a legislative shortening of the statute of limitation, the law is clear that failure to provide a reasonable time thereafter for plaintiffs with an existing claim to bring suit is a Due Process violation. Atchafalaya Land Co. v. F.B. Williams Cypress Co., 258 U.S. 190, 196-97 (1922). As this Court has stated: "So, too, it has been held that statutes of limitations must give a party a reasonable time to sue, and if a particular statute should fail to do so it would be within the

competency of the courts to declare the same unconstitutional and void." Campbell v. City of Haverhill, 155 U.S. 610, 615 (1895). On the merits of his claim, Petitioner would argue that, as applied in this and similar situations, the Alabama statute of limitations for libel and slander has not provided a reasonable time in which to sue. See Boddie v. Connecticut, 401 U.S. at 379 (a generally valid statute may be unconstitutional as applied).

This Court has recognized the inequity of applying a statute of limitation to bar a claim which the Plaintiff could not by exercising reasonable diligence have discovered in time. Urie v.Thompson, 337 U.S. 163 (1949); Holmberg v. Armbrecht, 327 U.S. 392 (1946). In neither of these cases was the Due Process Clause relied upon, but

the statements and reasoning indicates the Court's awareness of the fundamental unfairness in time-barring a claim before Plaintiff could have discovered it. For instance, in Urie, the Court said:

> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights.

337 U.S. at 170.

The Court said that to rule otherwise would afford Plaintiff only a "delusive remedy." 337 U.S. at 169. And in Holmberg, the Court said in regard to a fraudulent concealment of a cause of action:

> Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it

> interposes against other forms of fraud. And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

327 U.S. at 396-97.

Admittedly the state does have a legitimate interest in limiting the time in which actions may be brought, but such purposes are not served by applying the statute in this and similar cases. The traditional purpose of statutes of limitation is to prevent surprise, to keep memories and evidence intact, and to bar plaintiffs who have slept on their rights. See American Pipe and Construction Co. v. Utah, 414 U.S. 538, 554-55 (1974). There is no element of surprise here as Equifax

expected significant litigation and affirmatively tried to avoid it by covering up the original report. [Plaintiff's Exhibit 1; R5-157, 171, 172; R6-87; R6-11]. Evidence and memories are fully intact as most of the proof lies in written documents and there is no indication that Equifax was put to any disadvantage by the passage of time. And it certainly could not be argued that Petitioner slept on his rights; he could not possibly have known about the report until Penn National finally produced it after almost one and a half years of ignoring its duty to do so. If his Request for Production had been timely honored by Penn National, he would have known about the report in time. His timely use of Federal discovery procedure most certainly establishes due diligence by Petitioner.

Judicial pronouncements from other courts or individual judges have suggested that the concept of Due Process does require a discovery rule. E.g., Nelson v. Krusen, 678 S.W. 2d 918 (Tex. 1984); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959) (McBride, J., concurring in the result); Garrett v. Raytheon, 368 So. 2d 516, 524 (Ala. 1979) (Faulkner, J., dissenting); Bradley v. Irwin, 166 Pa. 548, 31 A. 261 (1895); see also Lankford v. Sullivan, 416 So. 2d 996, 1003 (Ala. 1982) (10 year statute of repose violates due process partly because it does not provide for an extension of time to bring suit for someone who is injured shortly before the 10 year period expires, and this is arbitrary) (per Almon, J., with three Justices concurring specially and one Justice concurring in the result); Tucker v. Nichols, 431 So. 2d 1262 (Ala.

1983) (Medical Malpractice Act construed so as to provide equal application to one who discovers his claim just before two year limitation but does not file suit within two years of the accrual of his claim, and one who discovers claim more than two years after accrual but sues within six months of discovery, where face of Act would bar the former but not the latter).

Other courts have recognized the inequity of Petitioner's predicament and have adopted a discovery rule through their inherent power to determine when a cause of action accrues. E.g., Franklin v. Albert, 381 Mass. 611, 411 N.E.2d 458 (1980); Raymond v. Eli Lilly & Co., 371 A.2d 170 (N.H. 1977). For an extensive list of cases applying discovery rules, see the following: Annot., 70 A.L.R. 3d 7, §5 (1976 & Supp. 1987); Annot., 4

A.L.R. 3d 821, §9 (1965 & Supp. 1987); Annot., 80 A.L.R. 2d 368, §7 (1961 & Supp. 1987).

Whatever the ultimate decision on the merits of Petitioner's Due Process claim, the importance, wide spread effect, and fundamental unfairness of applying statutes of limitation to bar claims which a reasonably diligent Plaintiff could not have discovered in time, indicates that this Court should pass upon the issue.

## V. THE DECISION BELOW COMPLETELY IGNORES ESTABLISHED ALABAMA LAW REGARDING CONCEALMENT OF A CLAIM BY A THIRD PARTY AS TOLLING THE STATUTE OF LIMITATIONS

As stated above, Penn National, a third party to the present action, avoided complying with discovery requests and orders in its Declaratory Judgment action against Petitioner for almost one and a half years. It is undisputed that had Penn National timely complied with its discovery obligation, Petitioner would have known about his cause of action within the limitation period. Nevertheless, the court below held that under Alabama law the concealment of a cause of action by a third party did not serve to toll the statute. In so doing, the court relied upon two Alabama cases which are distinguishable from the present case, and ignored the more recent case of Vandegrift v. Lagrone, 477 So. 2d 292 (Ala. 1985) which held that the fraudulent

concealment of the existence of a will by a third party tolls the statute of limitation for submitting the will to probate. The clear implications of applying Vandegrift to the present case were not discussed by the Eleventh Circuit and were apparently ignored by it.

In Vandegrift, the Alabama Court said:

> If the existence of the will is fraudulently concealed from the proponent, he is effectively precluded from filing a petition for probate, whether it is the contestant or some third party who is guilty of concealing the will's existence. The proponent should not be deprived of the opportunity to establish his right to the property by the fraudulent concealment of the will by an heir at law of the deceased who, by concealing the existence of the will, seeks to obtain property rights to which he is not entitled.

477 So. 2d at 294. (Emphasis added).

Clearly then Alabama's fraudulent tolling statute can be applicable whether

it is the defendant or some third party who has concealed facts which would have led the Plaintiff to discover his cause of action. In the present case, the original suit by Petitioner against Penn National contained requests for production of documents to Penn National which certainly included the subject report. The original request for production was required to be responded to well within the time when Petitioner could have brought his claim against Respondent Equifax. However, by stonewalling for almost one and a half years, Penn National was able to conceal the subject report from Petitioner until after the one year statute had expired.

It is this concealment by Penn National, when it was under a duty to disclose the report as per the Federal Rules of Civil Procedure, that resulted in

Petitioner's complaint against Equifax to be delayed beyond the time allowed by the applicable statute of limitations. Since the proper application of state law by the federal courts is a necessary part of the comity existing between state and federal government, this Court should grant certiorari in order to exercise its supervisor responsibility in this regard, and to assure that federal courts interpret state law in accordance with decisions from the state's highest court.

## VI. THE DECISION BELOW ON RICO IGNORES THIS COURT'S RULING IN SEDIMA S.P.R.L. v. IMREX CO., INC.

Summary Judgment was granted for Defendant in the trial court on Petitioner's RICO claim, and that ruling was affirmed below with only the following discussion: "As we find that Hovater's contentions for establishing violations of civil RICO are completely without merit, we affirm the district court's grant of summary judgment on that issue." 823 F.2d at 421.

This treatment of Petitioner's RICO claim makes it difficult to ascertain the basis of the court of appeals' ruling, but Petitioner submits that the decision disregards both the record before the trial court upon submission of summary judgment,and this Court's interpretation of RICO in Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985).

A defendant who moves for summary judgment has the burden of showing the absence of any material fact. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). For this reason, the evidence before the court upon submission of the motion must be viewed in the light most favorable to the non-moving party. Id. When the evidence which was before the district court in the present case is viewed under this standard, it is apparent that summary judgment was erroneously granted to Respondent Equifax on Petitioner's RICO count.

The Sedima decision indicates that the RICO statute should be read literally, and that the lower courts had incorrectly attempted to limit its reach by reading into the statute requirements not expressed by Congress. The elements of RICO as set out in Sedima are (1) conduct,

(2) of an enterprise, (3) through a pattern, (4) of racketeering activity. An application of RICO, as interpreted in Sedima, to the record in the present case would reveal that the Petitioner has presented sufficient facts to sustain his RICO count. The ruling of both the district and the circuit court would indicate that they were applying a pre-Sedima interpretation of RICO to this case.

Briefly stated, the facts set out in Petitioner's complaint which were not controverted by Equifax or which were before the Court as a part of the record by affidavit or deposition were as follows: The subject report contained numerous gross inaccuracies which were not verified in accordance with Equifax's own policies and procedures, contained assertions of criminality totally

unsupported by fact, and Equifax knew or should have known of the falsity of the report thereby rendering them fraudulent misrepresentations. A device, artifice or scheme to defraud was instituted by Equifax through numerous mailings and telephone conversations transmitting those false statements with the intent of inducing those to whom the information was conveyed to believe that they were true.

The report was mailed on November 22, 1982, to at least four separate entities: (1) Penn National, (2) Attorney Braxton Ashe, (3) Doug Hargett, and (4) Dick Romard. Each of these four mailings violated 18 U.S.C. §1341, and thereby were predicate offenses under 18 U.S.C. §1962.

Equifax determined that the subject report contained defamatory statements and decided to undertake a "cover-up" by destroying the reports which were

outstanding. The reason for those actions was "to escape significant litigation." [Plaintiff's Exhibit 25]. On or about November 24, 1982, Equifax telephoned Penn National, Attorney Ashe, and Doug Hargett, in an effort to obtain the reports which had been published to them. Those calls were in furtherance of a fraudulent scheme to cover-up the defamation contained in the original reports, violated 18 U.S.C. §1343, and thereby were further predicate offenses under 18 U.S.C. §1962.

Thereafter, on December 6, 1982, Equifax mailed to each of the above mentioned entities copies of the amended report, which implied that Equifax had conducted further investigations and that the new report reflected such re-investigation. In fact, no further investigation had been conducted. Due to the false statements contained therein,

these mailings violated 18 U.S.C. §1341, and thereby constituted four more predicate offenses under 18 U.S.C. §1962. The above activities clearly establish the required pattern of racketeering activity.

There can be little doubt but that Petitioner was injured "by reason of" the above recited "pattern" of mail and wire fraud. At trial Equifax conceded the falsity of the subject report. Because of the denial of coverage by Penn National, based in part upon the fraudulent misrepresentations outlined above, Petitioner was caused to incur legal and other expenses of $61,229.35 in obtaining the insurance proceeds to which he was entitled.

As mentioned above, it is impossible to know the basis of the decision below. It seems clear, however, that the court of appeals did not attempt to give RICO the

broad interpretation mandated by this Court in Sedima. Whatever the ultimate decision on the merits of Petitioner's RICO claim, the Court should grant certiorari in order to assure that its Sedima decision is being followed by the lower courts, and that pre-Sedima attempts to narrow the scope of RICO are not still the actual practice.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on all attorneys of record by mailing a copy of the same to them by United States mail, properly addressed and postage prepaid this the 28th day of October, 1987.

Ralph M. Young

## APPENDIX

1. Opinion of the court below: Hovater v. Equifax, Inc., 823 F.2d 413 (11th Cir. 1987)

2. Judgment of the court below, entered July 30, 1987.

Roger D. Hovater, Plaintiff-Appellee,
Cross-Appellant,

v.

EQUIFAX, INC., Equifax Services, Inc.,
and Equifax Services, Ltd.,
Defendants-Appellants, Cross-Appellees.

No. 86-7419.

United States Court of Appeals,
Eleventh Circuit.

July 30, 1987.

Appeals from the United States District Court for the Northern District of Alabama.

Before HATCHETT and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

I.

This case comes before the Court on cross appeals. Equifax Services, Inc. (Equifax) appeals from a jury verdict and awards of compensatory and punitive damages for defamation and for violations of the Fair Credit Reporting Act, (FCRA), 15 U.S.C. § 1681 et seq. Concurrently,

Roger Hovater (Hovater) appeals from the district court's grant of summary judgment for Equifax on his civil RICO claims. 18 U.S.C. §§ 1961-68. As we find that Hovater's state law claims for libel and slander were time barred and that the FCRA does not apply in this case, we reverse the decision of the district court and remand this case for entry of a judgment for Equifax. The district court's summary judgment order on the RICO claims is affirmed.

## II. FACTS

At the center of this controversy is a report on an investigation about Hovater that Equifax prepared and provided to Pennsylvania National Mutual Casualty Insurance Co. (Penn National), a non-party, and certain others. The circumstances surrounding the preparation and dissemination of this report are as follows.

On September 1, 1982, the old Hovater homeplace, located in Colbert County, Alabama, was destroyed by fire. At the time, the Hovater family resided elsewhere. It is undisputed that arson caused the blaze. After the fire, Hovater filed a proof of loss with his insurer, Penn National. In light of the circumstances, Penn National's attorney, Braxton Ashe, sought to obtain background information about Hovater for use in evaluating the claim. Towards that end, Penn National hired Equifax.

Equifax assigned the task of investigating Hovater to Greg Rowe, a claims investigator in its Huntsville, Alabama, office. Mr. Rowe performed his investigation on November 15 and 16, 1982. Rowe conveyed the results of the investigation orally to Braxton Ashe, Penn National's attorney, and to the Colbert county Sheriff's Department. Rowe also

summarized his results in writing in a report dated November 18, 1982 and sent copies to: 1) Braxton Ashe, Penn National's Attorney; 2) James Goad, Penn National's Claims Manager; 3) Richard Romard, Equifax's Fire Investigation Supervisor in Atlanta; and 4) the Colbert County Sheriff's Department. Rowe's report accused Hovater, inter alia, of associating with known arsonists and of having accumulated large gambling debts.

Upon reviewing the report on November 23, 1982, in Equifax's Atlanta office, supervisor Romard recognized that the report was extremely shoddy and that its dissemination to the authorities violated company policy. Romard concluded that the copies of the report should be retrieved and destroyed and that a revised report should be provided only to Penn National. The report was retrieved and revised and the new report was sent to Penn National.

On December 22, 1982, Penn National contested Hovater's fire insurance claim by filing suit for declaratory relief to determine its liability under the policy. Penn National alleged arson and misrepresentation in terms of the contents of the house, its lien holders, and its occupancy, as grounds for not paying Hovater on the policy. While Penn National initiated the suit, it was less than cooperative in complying with Hovater's requests for discovery or with the court's orders compelling the production of evidence. Ultimately, on January 18, 1985, Penn National did produce a number of documents including a copy of Equifax's initial 1982 report. It seems that while Penn National had returned the original report to Equifax as requested, it had retained a copy in its files. On February 4, 1985, Penn National

settled its dispute with Hovater for $129,000.

On February 19, 1985, Hovater requested Equifax's Florence, Alabama, office to disclose to him any information it had about him. Hovater was referred to the Birmingham office where upon initial investigation his file was not located. It appears that his file had been transferred to Atlanta when the 1982 report was revised and reissued. Equifax informed Hovater that it would be back in touch with him but before it did so Hovater filed suit. This Hovater did on March 1, 1985, less than two weeks after he first contacted the agency. Pursuant to discovery, by mid-April of 1985, Equifax provided Hovater with a copy of the initial 1982 report. Equifax had also retained a copy of the report which it placed in investigator Rowe's personnel file.

Hovater sued Equifax for its preparation and dissemination of the 1982 report under various legal theories. The portions of Hovater's complaint which are pertinent to this appeal include his claims for libel and slander under Alabama law, violations of the Fair Credit Reporting Act, and civil RICO. The trial judge let the claims for defamation and violation of the FCRA go to the jury, which found for Hovater, but granted summary judgment for Equifax on the claims for civil RICO. Both parties have appealed.

## III. DEFAMATION

Equifax argues that Hovater's claims for libel and slander were barred by the applicable statue of limitations. It is uncontested that the applicable limitation period was one year. Ala. Code § 6-2-39(a)(4) (1975); see, e.g., Holdbrooks v. Central Bank of Alabama, N.A., 435 So.2d 1250, 1251 (1983).

Further, it is uncontested that Hovater did not file suit until more than two years from the date of publication of the alleged defamation, the event giving rise to a cause of action under Alabama law and causing the statute to commence running. The district court held that the limitations period had tolled until Hovater discovered the existence of his cause of action. Accordingly, the court held that Hovater's action was not time barred.

The basis for the district court's decision that the limitations period had tolled is Ala.Code § 6-2-3 (1975). On its face, this statute provides for the tolling of the limitations period in actions involving fraud until such time as the aggrieved party discovers or should have discovered the cause of action. Significantly, the Alabama courts have construed the tolling provision of § 6-2-3

to apply not only to causes of action for fraud but also to the concealment of the existence of other types of causes of action where a party has a duty to disclose the information upon which the cause of action is based because of the existence of a confidential relationship between the parties or due to the presence of some special circumstance. Holdbrooks, 435 So.2d at 1251; Tonsmeire v. Tonsmeire, 285 Ala. 454, 233 So.2d 465, 468 (1970); Ala.Code § 6-5-102 (1975). The district court found that the statute had tolled in this case. On the basis of Alabama law, however, we must disagree. Under the applicable precedents no confidential relationship or special circumstances existed which required Equifax or Penn National to divulge the existence of a potential cause of action for defamation to Hovater. As there was no requirement

of disclosure, no grounds for tolling the statute was present.

The Alabama Supreme Court's decision in Tonsmeire, 233 So.2d 465 (1970), is illustrative. A wife sued her estranged husband for libel. The suit was dismissed because she filed it more than a year after the date the alleged libel was published. She appealed on the ground that the limitation period was tolled due to the parties' confidential relationship as husband and wife. The Alabama Supreme Court held that while the parties were still legally married at the time of the publication of the alleged libel, the deterioration of their marriage and its impending dissolution ended its status as a confidential relationship. Id. at 467. The court then stated that:

> In the absence of a confidential relationship, we know of no duty imposed by law obligating an alleged tort feasor to make known to one possibly injured by his acts the existence of a possible cause of

> action. Nor was there any duty on the part of those to whom the libel was published to inform the plaintiff of the alleged libel.
>
> Since no duty to inform the plaintiff was cast either upon the defendant or those to whom he allegedly published the libel, plaintiff's reason for delay in filing her suit in realty resulted from ignorance of her alleged cause of action.

Id. at 468. The court noted that ignorance of a cause of action does not typically toll the limitations period for to do so would be to undermine the valuable policy consideration behind such statutes.

Tonsmeire is frequently cited for the proposition that absent a confidential relationship no duty to disclose a potential cause of action for defamation arises. Cases decided on the basis of Tonsmeire elaborate this concept as well as provide illustrations as to what are confidential relationships under Alabama law. Holdbrooks v. Central Bank of Alabama, N.A., supra, is such a case.

In Holdbrooks, the Alabama Supreme Court held that a bank did not have a duty to inform a guarantor of an allegedly libelous statement it made about the guarantor in a report to a credit agency. The court held that the parties did not occupy the type of confidential relationship requiring disclosure, especially in light of the bank's expressed intent to foreclose on the loan. Id. 435 So.2d at 1252. Similarly, in Clay v. Equifax, 762 F.2d 952, 961 (11th Cir.1985), this Court held on the basis of Alabama law that an insurance company was not required to disclose to an insured allegedly libelous statements contained in a report the insurer received from Equifax.

> Although we recognize that insurers owe a duty of good faith to their insureds, we do not believe that duty is equivalent to the confidential relationship envisioned by the Alabama courts [so as to require the insurance company to divulge a potential cause

> of action for defamation to an insured].

Id. at 961. Accordingly, the Clay court held that disclosure was not required.

Thus, in Tonsmeire, neither a husband nor the persons he made the allegedly defamatory statements to were required to disclose the event to the man's estranged wife. In Holdbrooks, a bank was not required to inform a guarantor that it may have made libelous statements about him to a credit agency. Furthermore, we read the court's silence on the issue in Holdbrooks to also mean that the credit agency was not required to disclose the bank's statements to the guarantor. Lastly, in Clay, this Court held that an insurance company was not required to divulge to its insured an allegedly libelous statement in a report it received from Equifax for use in evaluating a claim for benefits. Furthermore, the Clay court impliedly determined that Equifax and was

[sic] not required to divulge its statements to the insured.

On the basis of Alabama law, as illustrated by the preceding cases, we hold that no confidential relationship existed between Hovater and either Equifax or Penn National requiring either of the latter entities to divulge the existence of a potential cause of action for defamation to Hovater. In the absence of such a confidential relationship, there was no grounds for tolling the statute.

Furthermore, we hold that no "particular circumstances" existed under the facts of this case as an alternate ground upon which to toll the statute. See Ala.Code § 6-5-102 (1975). While the district court found otherwise, our holding see infra, part IV, that the Fair Credit Reporting Act does not apply in this case removes from consideration the FCRA's notice and disclosure provisions as circumstances

upon which to base a tolling of the statute. Absent a confidential relationship or particular circumstances upon which to base a tolling Hovater's claims for defamation were time barred and the district court erred in ruling otherwise.

IV. FRCA [sic]

The district court found that Equifax's 1982 report to Penn National was a "consumer report" governed by the Fair Credit Reporting Act. 15 U.S.C. § 1681. In accordance with this finding, the jury awarded Hovater damages for Equifax's negligent noncompliance with the Act. 15 U.S.C. § 1681o. As we hold that the 1982 report was not covered by the FCRA, we find that the question of compliance was improperly before the jury. The district court's decision on this issue is reversed and the case is remanded for entry of a

judgment for Equifax on this issue as well.

In 1970, Congress passed the Fair Credit Reporting Act. 15 U.S.C. § 1681 et seq. Recognizing the necessity of credit reporting agencies in our modern economy, Congress sought through the FCRA to curb some of the abuses inherent in the industry.[1] To that end, Congress enacted the FCRA which seeks to establish credit reporting practices that utilize accurate, relevant, and current information in a confidential and responsible manner. See 15 U.S.C. § 1681(b).

The FCRA focuses on the rights of consumers by regulating the practices of credit agencies and the recipients of their reports. 15 U.S.C. § 1681. Typically, the Act's safeguards are invoked when a consumer applies for credit, insurance or employment. 15

U.S.C. § 1681(a). In many instances, the Act requires an entity dealing with a consumer under one of the above-mentioned circumstances to disclose to the consumer that the party is going to make an investigation or procure information from a credit reporting agency about the consumer for use in considering the individual's application. 15 U.S.C. § 1681d. Significantly, the Act requires that whenever credit, insurance, or employment is denied a consumer or an adverse decision is made concerning a consumer's existing status on the basis of information contained in a credit report, the party that relies on the report must inform the consumer that the denial of his application, or the adverse action, resulted in whole or in part from the information contained in the report. The party relying on the report must also supply the consumer with the name and

address of the reporting agency that provided the information. 15 U.S.C. §1681n. Upon request and identification, the reporting agency is required to divulge the information in its files concerning the interested consumer. 15 U.S.C. § 1681g. If a consumer reasonably disputes the completeness or accuracy of the information contained in his or her file, the consumer may communicate this disagreement to the reporting agency thereby invoking the agency's statutory duty to reinvestigate. 15 U.S.C. § 1681i. If such an investigation fails to resolve the dispute, the consumer may file a statement contesting the information which is incorporated into the consumer's file. Id. In addition to the aforementioned safeguard, the Act protects the consumer generally by requiring that obsolete information not be included in consumer reports, § 1681c, that reporting agencies

follow reasonable procedures intended to assure the maximum possible accuracy of the information contained in reports, § 1681e, and that the confidentiality of the information be maintained by limiting the parties with access to reports to those with a legitimate interest in obtaining the information. § 1681b. Finally, to assure enforcement, the Act provides for both penal and civil remedies, including attorney's fees, for various forms of noncompliance. §§ 1681n, 1681p, 1681q.

While oversimplified, the foregoing description of the FCRA sets the stage for the narrow issue that this Court is faced with today. Generally stated, that issue is whether the FCRA governs information given by a consumer reporting agency to an insurance company for the insurer's use in considering an insured's claim for benefits under an existing policy. Stated

more specifically and in light of the fact that the FCRA expressly regulates "consumer reports", the question may be phrased as whether Equifax's 1982 report to Penn National was a "consumer report" governed by the FCRA. On the basis of the express language of the FCRA, the Congress' intent as drawn from the Act's legislative history, and the weight of existing authority on the issue, we hold that a report which an insurer procures from a credit reporting agency solely for use in evaluating an insured's claim for benefits under an existing policy is not a "consumer report" subject to the regulatory provision of the FCRA.

A. Statutory Language

As indicated, the provisions of the FCRA govern "consumer reports" and also "investigative consumer reports." Reports that do not fall within either of these

definitional categories are outside the coverage of the Act. Under the statute:

> The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title.

§ 1681a(d). Summarized, the preceding section describes a "consumer report" as information from a credit reporting agency about a consumer for use in making eligibility determinations about credit, insurance, or employment. Section 1681b seems to add licensing and certain other governmental benefits to the list of eligibility determinations covered by the Act. § 1681b(3)(D). In addition, § 1681b

limits the dissemination of consumer reports. Section 1681b reads:

> **§ 1681b. Permissible purposes of consumer reports**
>
> A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> (1) In response to the order of a court having jurisdiction to issue such an order.
>
> (2) In accordance with the written instructions of the consumer to whom it relates.
>
> (3) To a person which it has reason to believe--
>
> (A) intends to use information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
>
> (B) intends to use the information for employment purposes; or
>
> (C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
>
> (D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
>
> (E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

In conjunction §§ 1681a and 1681b provide the definition of a "consumer report." An "investigative consumer report," which is merely a special breed of "consumer report", is wholly defined by § 1681a(e). That section provides:

> The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information.

Considering the Act's definitional sections, it is clear that a transference of information by a credit reporting agency to an insurance company for the sole intended purpose of evaluating a claim for insurance benefits under an existing policy is not a "consumer report" nor an "investigative consumer report" under the Act. In terms of the insurance industry, § 1681a speaks of a consumer

report as a "communication of any information by a consumer reporting agency ... which is used ... in establishing the consumer's eligibility for ... insurance...." § 1681a(d) (emphasis added). Section 1681b(3)(C) describes the consumer report "in connection with the underwriting of insurance." (emphasis added). The language in these sections refers unequivocally to the inception and maintenance of the insurance contract. The phrases speak in terms of information concerning a consumer's ability to get and keep insurance, they does [sic] not relate to information that is collected or transferred for the purpose of evaluating evaluating an insured's claim for benefits under an existing policy. The express language of the Act does not reach reports for the purpose of evaluating claims for benefits, accordingly, we hold that such reports are not governed by the FCRA.

While the express language of the Act does not include insurance claims reports, the argument is made that such reports fall under the Act's catch-all provision. Section 1681b(3)(E), the Act's final comprehensive enumeration of the permissible circumstances for the dissemination of consumer reports provides that in addition to the court, a consumer, and persons who intend to use reports for purposes of credit, employment, the underwriting of insurance, or licensing, a report may be provided to a person who a credit agency has reason to believe "otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer." The argument goes that insurance claims reports fall within this provision.

Courts addressing this argument have tackled the perceived overinclusiveness of

Section 1681b(3)(E) in a predictable manner. Canons of Statutory Construction have been invoked to resolve the conflict. Typically, the courts have recognized the preeminence of § 1681a and conformed the breadth of § 1681b to its bounds. Examples include Cochran v. Metropolitan Life Ins. Co., 472 F.Supp. 827 (N.D.Ga.1979), where the court relied on the canon which seeks to preserve the substance and effect of all sections of an enactment in finding that § 1681a controls the breadth of § 1681b(3)(E). "Not to do this would render unnecessarily meaningless the § 1681a restrictive language ..." while "[c]onforming §1681b to 1681a preserves the integrity of both sections, while promoting the underlying purpose of the entire subchapter." Id. 831. In Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144 (3rd Cir.1986), the Third Circuit agreed with Cochran, but

also relied alternatively on the rule of ejusdem generis--when general words follow an enumeration of specific terms the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words--in limiting §1681b(3)(E). Id. at 1150. And in Fernandez v. Retail Credit Company, 349 F.Supp. 652 (E.D.La.1972), in deciding a related issue, the court found that Section 1681a was the Act's "primary" definitional section while Section 1681b was only supplementary in that it served the purpose of helping to interpret the former section. Id. at 654. In sum, Section 1681b(3)(E) has not been given an expansive interpretation. On the other hand, thoughtful reasons against giving Section 1681b(3)(E) too narrow of an interpretation have also been articulated. See Houghton, supra, at 1150 (Sloviter, J. concurring).

Whatever the proper interpretation of Section 1681b(3)(E), we hold that that provision does not reach insurance claims reports. Congress expressly discussed insurance in both definitional sections of the Act. See §§ 1681a and 1681b. In so doing, Congress spoke in terms of information relating specifically to the inception and maintenance of the insurance contract. As Congress declined in its explicit treatment of the subject of insurance to regulate insurance claims reports, we decline the opportunity to do so by reading the catch-all provision of Section 1681b(3)(E) to effectuate that end.

B. Legislative History

The legislative history of the FCRA evidences Congress did not intend to regulate insurance claims reports. The lengthy transcripts of the Senate Subcommittee hearings on S. 823, 91st

Cong., 1st Sess. (1969), which substantially became the Act, do not reflect any inclination to extend the statute's reach beyond reports prepared in connection with insurance applications. See generally, Hearings Before the Subcommittee on Financial Institutions of the Comm. on Banking and Currency, 91st Cong., 1st Sess. (1969). The same is true of the hearing transcripts of the House Subcommittee, which considered a more protective bill. See generally, Hearings on H.R. 16340 Before the Subcommittee on Consumer Affairs of the Comm. on Banking and Currency, 91st Cog., 2d Sess. (1970.)

That Congress envisioned the Act as having a limited reach is also made plain by events subsequent to the bill's enactment. During Senate Subcommittee hearings in 1973, Senator Proxmire, who authored the Senate Version of the FCRA, chaired the Senate Subcommittee

considering it, and guided the legislation through the House-Senate conference, considered whether the Act should be broadened to include insurance claims reports. See Hearings on S. 2360 Before the Subcommittee on Banking, Housing and Urban Affairs, 93rd Cong., 1st Sess. 61-612 (1973). Two years later, Senator Proxmire proposed legislation which would have expanded the Act to cover "general investigative reports." See S. 1840, 94th Cong. 1st Sess., § 5(a) (1975). When that legislation failed, Senator Proxmire renewed his effort to expand the Act in 1979, seeking specifically to include insurance claim reports in the definition of "consumer reports." S. 1928 96th Cong., 1st Sess. § 2(a) 1324-25 (1979). However, like the amendment proposed in 1975, the 1979 amendment never became law. The inference that springs form [sic] this chain of events is that Congress did not

believe that insurance claims reports were governed by the FCRA. Congress' refusal to revise the law indicates that it was content with that interpretation of the Act.

The Federal Trade Commission ("FTC") was designated by Congress to enforce the Act. In 1971 the FTC issued a question and answer pamphlet addressing a number of issues that had arisen soon after the Act had taken effect. One of the questions was:

> Are "CLAIMS REPORTS", "ADJUSTMENTS REPORTS" or other reports obtained by an insurer in connection with an insurance claim a consumer report?

The FTC's answer was:

> No, not at the time obtained. A report on a consumer, obtained by an insurance company in connection with a claim against it, is not used to determine a consumer's "eligibility" for insurance (Section 603(d)(1) [15 U.S.C. § 1681a(d)(1)] or in connection with the "underwriting of insurance involving the consumer" (Section 604(3)(C) (15 U.S.C. § 1681b(3)(E)). Further such report is not obtained in connection with a "business transaction involving the

> consumer" (Section 604(3)(E) [15 U.S.C. § 1681b(3)(E)] at the time it is obtained. Accordingly, such a claims report is not a "consumer report."

"Compliance with the Fair Credit Reporting Act",: 5 CONSUMER CRED.GUIDE (CCH) ¶ 11,307 at 59,828 (1977).

This FTC interpretation is signigicant in light of the fact that Congress, aware of the published rulings cited above, has not seen fit to amend the Act to cover what the FTC has said the Act excluded. In 1978, Congress revisited § 1681c, amending it in certain particulars. That Section restricts the sort of information a "consumer report" may contain. By re-enacting the FCRA without changing the relevant statutory definition of a "consumer report", even though the FTC had given it a restricted interpretation, Congress gave an indication that it approved the agency's position. "'Congress is presumed to be aware of an

administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change .'" Merill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 n. 66, 102 S.Ct. 1825, 1841 n. 66, 72 L.ED.2d 182 (1982); NLRB v. Gullet Gin Co., 340 U.S. 361, 366, 71 S.Ct. 337, 340, 95 L.ED. 337 (1951) (By re-enacting provision without pertinent modification, Congress accepted enforcement agency's interpretation).

In light of the Act's legislative and subsequent history, we conclude that Congress did not intend for the Act to govern claims reports.

C. Existing Precedent

The majority of courts that have addressed the issue have held that insurance claims reports are not governed by the FCRA.

The leading case in the area is Cochran v. Metropolitan Life Insurance Co, 472 F.Supp. 827 (N.D.Ga.1979). Cochran is a well reasoned and thorough opinion firmly supporting its conclusion that the FCRA does not reach insurance claim reports. Cochran's reasoning was recently adopted by the Third Circuit in Houghton v. New Jersey Manufacturers Insurance Co., 795 F.2d 1144 (3rd Cir.1986). A lower court decision in accord with the Cochran-Houghton line of authority is Kiblen v. Pickle, 33 Wash.App. 387, 395, 653 P.2d 1338, 1342 (1982).

Beresh v. Retail Credit Co., 358 F.Supp. 260 (C.D.Cal.1973), is apparently the sole authority for the proposition that insurance claims reports are governed by the FCRA. Beresh held that claims reports fall under the catch-all provision of Section 1681b(3)(E) of the Act, discussed supra. We find Beresh unpersuasive and

choose instead to align ourselves with the Cochran-Houghton line of cases.

In folloiwng Cochran, a 1979 decision from a district court in this Circuit, we feel compelled to distinguish this Court's decision in Clay v. Equifax, 762 F.2d 952 (11th Cir.1985), discussed supra. In Clay, this Court was faced with somewhat identical claims as those arising in this case. Without mentioning Cochran or Beresh, the Clay Court apparently assumed, for the sake of argument, that the FCRA applies to insurance claims reports. The court's assumption that the Act applies may be inferred from the Court's reliance on the substantive portions of the Act to find that each of the plaintiff's claims lacked merit. We read Clay as having assumed, arguendo, that the FCRA applied to insurance claims reports. Clay did not address the underlying issue, however, because it believed that even if the Act

applied the plaintiff was not entitled to relief. Clay did not discuss the merits of this issue but left for another day the underlying question of whether the FCRA applies to insurance claims reports. Distinguishing Clay in this manner and facing squarely the merits of this issue, we hold that insurance claims reports are not governed by the Act.

Finally and further in support of our holding, we recognize a host of cases, analogous to our decision today, which similarly refuse to expand the scope of the FCRA. See Henry v. Forbes, 433 F.Supp. 5 (D.Minn.1976) (lobbyist's request for information on adversary's aide is not a "consumer report"); Ley v. Boron Oil Co., 419 F.Supp. 1240 (E.D.Pa.1976) (report to establish identity of attorney for potential litigants is not a "consumer report"); Sizemore v. Bambi Leasing Corp., 360

F.Supp. 252, 254 n. 3 (N.D.Ga.1973), ("key man" insurance policy investigation serves business not personal purpose and is thus not a "consumer report"); Peller v. Retail Credit Co., 359 F.Supp. 1235 (N.D.Ga.1973), aff'd 505 F.2d 733 (5th Cir.1974) (employee's lie detector test results are not part of a "consumer report"); Porter v. Talbot Perkins Children's Services, 355 F.Supp. 174 (S.D.N.Y.1973) (adoption agency report on prospective adoptive parents is not a "consumer report"); Soto v. Industrial Commission, 18 Ariz.App.53, 500 P.2d 313 (1972) (report on workmen's compensation claimant's physical activities is not a "consumer report").

## V. CONCLUSION

Finding that Hovater's claims for defamation were time barred under Alabama law and that the FCRA does not apply in this case, we reverse the decision of the

district court on these issues. As we find that Hovater's contentions for establishing violations of civil RICO are completely without merit, we affirm the district court's grant of summary judgment on that issue.

Accordingly, this case is REVERSED in part, AFFIRMED in part and REMANDED for entry of a judgment for Equifax.

[1]For a concise history of the FCRA, see McNamara, The Fair Credit Reporting Act: A Legislative Overview, 22 Emory J.Pub.L. 67 (1973).

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7419

D.C. Docket No. 85-5136

ROGER D. HOVATER,

Plaintiff-Appellee,
Cross-Appellant,

versus

EQUIFAX, INC.,
EQUIFAX SERVICES, INC., and
EQUIFAX SERVICES, LTD.,

Defendants-Appellants,
Cross-Appellees.

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Appeals from the United States District Court for the Northern District of Alabama

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Before HATCHETT AND ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court

that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED in part and REVERSED in part; and that this cause be and the same is hereby, REMANDED to said District Court with instructions for entry of judgment for the defendants;

It is further ordered that plaintiff-appellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 30, 1987
For the Court: Miguel J. Cortez, Clerk
s/David Malaud
Deputy Clerk

ISSUED AS MANDATE: August 26, 1987